

Summary of Issues Raised During Consultation & Coordination Process

We have received input from tribal government officials, their staff, and representatives of tribal organizations during a series of conference calls, webinars, and face-to-face meetings since August 1, 2011. While a number of these comments reflect appreciation for the capacity building framework outlined in the proposed Guidebook, some concerns have also been raised. A summary of these issues and our interim response follows.

Q1: Will the proposed Guidebook change recipient eligibility criteria?

A1: No. Recipient eligibility criteria are established by statute to include all federally recognized tribes and intertribal consortia.

Q2: Will the proposed Guidebook eliminate federally recognized tribes in Alaska from receiving funds under the GAP?

A2: No. Federally recognized tribes in Alaska are statutorily eligible to receive funding under the GAP.

Q3: Does the proposed Guidebook *require* all tribes to assume the lead role for implementing federal environmental regulatory and enforcement programs?

A3: No. Consistent with EPA's 1984 Indian Policy, the proposed Guidebook encourages tribes that wish to develop the capacity to implement federal regulatory and enforcement programs to do so, consistent with their jurisdiction and authorities. While the proposed Guidebook provides an overall framework for building this type of capacity, the Guidebook also acknowledges that many tribes are not currently seeking to build the capacity to take the lead role for implementing programs administered by EPA. Specifically, the proposed Guidebook states:

EPA also provides technical and financial assistance to build environmental program capacity for tribes that, for whatever reason, are not currently able to implement federally authorized regulatory and enforcement programs. This helps EPA ensure that all federally recognized tribes have the opportunity to meaningfully participate in the Agency's policy making, standard setting, and direct implementation activities potentially affecting tribal interests. This also helps all tribal governments cooperate and, when appropriate, enter into intergovernmental agreements with neighboring state and local government authorities in an informed manner. This assistance helps tribes identify and characterize environmental protection priorities for their communities and meaningfully participate as informed partners to resolve environmental problems.
(Pages 1-2 of Consultation Draft)

This text is consistent with the Indian policy that states EPA's commitment to: "Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs"; and "EPA will encourage early communication and cooperation among Tribes, States and local governments".

Q4: Does the proposed Guidebook require recipients to demonstrate regulatory jurisdiction over facilities, activities, or sites within their territories before receiving GAP assistance?

A4: No. Specifically, the proposed Guidebook states:

Some tribes may not have exclusive environmental regulatory jurisdiction over facilities, activities, or sites within their territories. In keeping with the general federal trust responsibility and the EPA Indian Policy, the Agency recognizes that these tribal governments should still be afforded the opportunity to develop an environmental program that will support their meaningful involvement in the protection of tribal member health and natural resources that may be utilized by tribal members. Tribes with limited jurisdiction to implement federal environmental regulatory programs may develop core program capacities for purposes consistent with the extent of their authorities, such as developing voluntary or partial environmental management programs, participating in EPA policy making, coordinating with EPA or other federal agencies to implement federal environmental programs, and may consider entering into joint environmental management programs with neighboring state or local environmental agencies. (Page 8 of Consultation Draft)

Q5: Does the proposed Guidebook establish a process by which a tribe or intertribal consortia will become ineligible to receive GAP assistance after capacity is successfully developed? Do the 1-2 year and 2-5 year general time lines imply that a recipient would no longer be eligible to receive GAP assistance beyond 5 years?

A5: No. There is a reasonable expectation that there should be some nationally consistent indicators to measure our progress at building tribal capacity over time. The proposed Guidebook contains an extensive set of indicators to show the progress a recipient is making in building their environmental management capacity. However, the proposed Guidebook is also clear that capacity development is a continuing programmatic requirement. Without sustained funding, a recipient may lose the program capacity achievements previously established and may fail to keep pace with new technologies, personnel transition planning/skill sharing, and increased complexity of environmental programs. Specifically, the proposed Guidebook states:

EPA recognizes that establishing core environmental protection program capacities is an on-going effort, reflecting that core capacities will evolve as the tribal environmental program itself expands and undertakes additional authorities. Tribes should re-evaluate their core program capacities on a regular basis to ensure that these systems, procedures, and policies are still appropriate for the current stage of the environmental management program. In addition, other core capacities may need to be added to support the more complex activities that will be undertaken as tribes develop media-specific environmental initiatives. (Page 8 of Consultation Draft)

Q6: Does the proposed Guidebook seek to limit flexibility and eliminate specific activities that have been funded in the past?

A7: No. The proposed Guidebook does not target specific activities that should no longer be funded. However, by providing more clarity on how we will measure our progress in building tribal environmental management capacity, some of the activities we have funded in the past may need to be reconsidered. Funding

decisions related to unusual, novel, or questionable activities should be addressed on a case-by-case basis in light of each recipient's priorities, overall program development goals, and EPA authorities.

Q8: The proposed Guidebook does not contain any text for section 9.0 (Implementation of the Guidebook). This is an important section and may directly affect tribes. How can consultation, coordination, review, and comment meaningfully occur without this section being drafted and shared in advance?

A8: EPA intentionally left this section blank as a place holder so that implementation issues could be identified during our consultation & coordination process. Based on input we have received, we have drafted the following paragraph. This or similar text may appear as part of a final Guidebook or in other material which will officially implement the Guidebook as guidance for the GAP assistance program, such as an official transmittal memo.

Proposed Text for a Guidebook Implementation Section

This Guidebook applies to the negotiation of work plans and budgets for GAP awards and, as such, EPA regional office personnel are expected to reference this Guidebook when reviewing applications for financial assistance from eligible recipients. Applicants are encouraged to consult this document during the development of application materials. The Guidebook will be in effect as of October 1, 2012 and will supersede previous guidance issued March 9, 2000 and February 24, 2006. All GAP assistance agreement awarded after the Guidebook takes effect shall be in accord with this Guidebook. Decisions regarding the distribution of GAP funding to tribes shall be in accord with this Guidebook and account for a tribe's prior progress, environmental capacity needs, and long-term program development goals. Regional offices may enter into assistance agreements and award GAP funds to eligible recipients prior to establishing a joint EPA-tribal environmental plan. However, the establishment of such a plan should be included as a component in all work plans approved for recipients that lack such a plan. Over time, EPA expects that every GAP assistance agreement recipient will have a joint EPA-tribal environmental plan in place and use that plan as the basis for identifying work plan components and appropriate funding levels most likely to achieve the recipient's short-term and long-term program development goals.